IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

ARBITRATION PETITION NO. 78 OF 2005

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Kalpataru Construction Overseas
Pvt.Ltd. ...Petitioners

v/s.

Shree Ram Mills Ltd. & Anr. ...Respondents

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Mr.Iqbal Chagla with Mr.F.D'vitre i/b Federal & Rashmikant for the Petitioners.

Mr.Vinod Bobde with Mr.Sham Diwan, Mr.P.A.Savant, Mr.Mohan Jaykar and Ms.Usha Dhamskar i/b Khaitan & Jaykar for Respondent No.1.

Ms.Pratibha Mohta i/b Little & Co. for the Respondent No.2.

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CORAM: D.K.DESHMUKH, J.

DATED: 19TH JULY,2005

P.C.:

1. This petition is taken out under Section 9 of the Arbitration & Conciliation Act.

2. The facts giving rise to this petition are that the Petitioner and the Respondent No.1 entered into a Memorandum of Understanding dated 28-06-2004, whereby an agreement was made for sale, transfer and assignment of sub-divided plot No.5A of lay out comprising Freehold land admeasuring 18998.48 sq.mts. out of Cadastral Survey No.289 of Lower Parel Division and Leasehold land admeasuring 1956.92 sq.mts. bearing part of C.S. No.1548 and 1549 and entire C.S. No.1550 all of Lower Parel Division together with vacant and peaceful possession of part of the Avadh Building admeasuring 5043 sq.mts. Built up area falling in sub-divided Plot No.5A and

consumption of total floor space index of 300,000 sq.ft. thereon (excluding area deductable under Regulation 35(2)(c) of D.C. Regulation 1991) by Shree Ram Mills Ltd.

3. As per the Memorandum of Understanding dated 28-6-2004, the agreed consideration was Rs.86.30 crores. It was also provided in the MOU as to how the amounts are to be paid. Clause (5) of the agreement also provided for furnishing of a bank guarantee of a particular type. Clause (5) of the contract contemplates execution of the transfer deed within a period of four months from the date of the agreement. Clause 15 provides for termination of the agreement. Thereafter, the agreement dated 28-6-2004 was modified by Addendum dated 10-12-2004. By the Addendum, now in stead of Rs.86.30 crores the consideration was agreed at Rs.105.30 crores. By that Addendum receipt of Rs.30 crores by the Respondent No.1 from the Petitioner was acknowledged. It was also provided that bank guarantee of Rs.57.5 crores in terms of clause 5 of the MOU would be furnished on conveyance and assignment and Rs.13.30 crores should be paid at that time. It appears that there was correspondence exchanged between the

parties in relation to execution of the conveyance. But ultimately, conveyance was not executed. By letter dated 14-1-2005 the Petitioner informed the Respondent No.1 that they are in a position to give the bank guarantee as contemplated by the agreement between the parties, but no steps were taken by the Respondent No.1. Therefore, this petition has been filed under Section 9 of the Arbitration & Conciliation Act, as there is an arbitration clause admittedly in the agreement between the parties.

4. In this petition the Petitioners pray for an order of temporary injunction restraining the Respondent No.1 from transferring the property as also a Receiver on the property. In this petition, a statement was made on behalf of the Respondents in relation to the property involved, which had more or less the effect of maintaining the status quo. That statement is presently operating as ad-interim order. The agreement between the parties contemplates three Members Arbitral Tribunal. Though the Arbitral Tribunal has admittedly been constituted, it is common ground that considering the nature of the arbitral tribunal, the arbitral tribunal will take considerable time in meeting and considering the

applications for interim reliefs. Hence the question of grant interim relief has to be decided by the Court.

5. On behalf of the Petitioners, it is submitted that an amount of Rs.30 crores admittedly has been paid by the Petitioners to the Respondent No.1. By letter dated 14-1-2005 the Petitioners also told the Respondents that the Petitioners are in a position to execute the bank guarantee in terms of the contract. The Petitioners were also willing to pay an amount of Rs.13.30 crores which is required to be paid at the time of execution of the conveyance, but the Respondents were now demanding higher amount and was refusing to execute the document. It is further submitted that as per the contract between the parties, the contract could be terminated by giving 30 days notice. No such notice has ever been given by the Respondents terminating the agreement. The Respondents have come up with unbelievable case that the Petitioners on their own orally repudiated the agreement. It is submitted that in view of the fact that an amount of Rs.30 crores was admittedly paid by the Petitioners to the Respondents and that the Petitioners were in a position to give the bank

guarantee, it is impossible to believe that the Petitioners have repudiated the agreement. It is submitted that the case of the Respondents that as the Petitioners were not in a position to get the conveyance executed in their favour within the time fixed by the Respondents and the Petitioners were not ready and willing to perform their part of the contract is incapable of being believed. It is submitted that the Petitioners were always ready and willing to perform their part of the contract and it is the Respondents who wanted to resile from the contract. It is submitted that the time was not essence of the contract.

6. On behalf of the Respondents, on the other hand, it is submitted that even assuming that the agreement has not been , repudiated as claimed in the reply filed by the Respondents because the Petitioners were not in a position to pay Rs.13.30 crores which they were required to pay at the time of coveyance and give bank guarantee as contemplated by the contract, it cannot be said that the Petitioners were ready and willing to perform their part of the contract. It is also urged that the agreement between the parties is an agreement to develop the land and therefore decree

of specific performance cannot be granted. It is submitted that considering the reasons why and the circumstances in which the agreement was entered into, time was the essence of the contract. Both the Counsel took me through the correspondence between the parties. They also relied on following judgments of the Privy Council and the Supreme Court of India in support of their submissions:

(i) AIR (37) 1950 Privy Council 90 (The Bank of India Ltd. and ors. v/s. Jamsetji A.H. chinoy and M/s.Chinoy and Co.);

(ii) AIR 1993 SC 1742 (Smt.Chand Rani Vs. Smt.Kamal Rani);

(iii) (1997) 3 SCC 1 (K.S.Vidyanadam & Ors. Vs. Vairavan);

(iv) (2002) 5 SCC 481 (Nirmal Anand Vs. Advent Corporation Pvt.ltd. & Ors.);

(v) (2000) 3 MHLJ 131 (G. Developers Vs. KKN Co.operative Housing Society);

7. It may be pointed out here that the learned Counsel for the Petitioners stated before me that the Petitioners to show their bonafide are willing to deposit the amount of Rs.13.30 crores as also furnish bank guarantee in terms of the contract between the parties. According to the learned counsel, therefore, the Receiver should be appointed on the property so that the property can be protected.

8. On the other hand, the learned Counsel appearing for the Respondents submits that as the Petitioners are not ready and willing to perform their part of the contract, the Respondents are willing to deposit Rs.30 crores, which has been paid by the Petitioners to the Respondents with interest and the Respondents are also willing to make a statement before the Court that in case the Respondents transfer the property to somebody else, the transferee will be given notice of the pending dispute between the parties.

9. Now, if in the light of these rival submissions the record of the case is perused, following emerge as admitted positions;

(i) That the Petitioners have paid an amount of Rs.30 crores to the Respondents.

(ii) The Petitioners by letter dated 14-1-2005 informed the Respondents that they are in a position to furnish the bank guarantee in terms of the contract between the parties.

(iii) Admittedly, the letter dated 14-1-2005 which was addressed to the advocate for the Respondents has not been responded.

(iv) By the Addendum between the parties, which is dated 10-12-2004, the consideration now was Rs.105.30 crores. As per the Addendum, Rs.57.5 crores were to be paid by way of bank guarantee on the execution of the conveyance as provided in clause 5. The relevant part of the Addendum reads as under-

> "Total consideration for sale, transfer and assignment of sub-divided plot No.5A of lay out comprising Freehold land admeasuring 18998.48 sq.mts. out of Cadastral Survey No.289 of Lower Parel Division and

Leasehold land admeasuring 1956.92 sq.mts. bearing part of C.S.No.1548 and 1549 and entire C.S.No.1550 all of Lower Parel Division together with vacant and peaceful possession of part of the Avadh Building admeasuring 5043 sq.mts. Built up area falling in sub-divided Plot No.5A and consumption of total floor space index of 300,000 sq.ft. thereon (excluding area deductable under Regulation 35(2)(c) of D.C.Regulation 1991) by Shri Ram Mills Ltd. (SRM) to Kalpataru Construction Overseas Private Limited (Kalpataru) stand revised and increased to Rs.105.30 crores instead of Rs.86.30 crores payable under the MOU dated 28th June, 2004 paid/payable as follows:

(a) Rs.10 crore has already been received by SRM.

(b) Further Rs.20 crores is received by SRM.

(c) Rs.57.5 crore will be paid to SRM by

way of Bank Guarantees on Conveyance and Assignment and Assignment as provided in Clause 5 of the said MOU.

(d) Rs.13.30 crore will be paid to SRM also on Conveyance and Assignment.

(e) Balance Rs.4.5 crore will be paid to SRM, after NOC of BMC Estate for assignment and utilization of FSI of leasehold land after deducting all payments therefore to Estate.

10. Perusal of clause 5 shows that clause 5 contemplated a bank guarantee of a particular type which was capable of being encashed immediately. The relevant part of clause 5 reads as under:-

...Provided, however, that the Developer shall furnish unconditional and irrevocable guarantees by the Developer's Bank/s/Financial Institution/s acceptable to the Owner/VIT in terms of the draft

> guarantees also acceptable to the Owner/VIT, guaranteeing the payments under sub-paras 5(v) and (vi) above on their respective due dates and these guarantees shall be such that the same should enable the Owner/VIT and/or its/their assignees to encash them immediately after they are issued.

11. Perusal of the agreement shows that it was agreed between the parties that conveyance will be be executed within a period of four months from the date of the agreement between the parties i.e. 28-6-2004. Admittedly, conveyance was not executed within that period. Parties entered into the Addendum, which does not specify any time limit for execution of the conveyance. Had it been the intention of the parties to the agreement to make time essence of the contract, though it was an agreement to sell immoveable property, the parties would have included a term in the addendum fixing a time limit for execution of the conveyance. This aspect strongly suggests that the parties did not intend that time should be the essence of the contract. Parties did not make by the Addendum any

change in clause 15 of the agreement, which deals with termination. Clause 15 reads as under:-

> 15. On the Owner/VIT complying with their obligations as provided in Clause 2, 3 and 4 above within 4 months from the date hereof, but the Developer fails to pay the agreed consideration amounts on their respective due dates, the Owner/VIT shall have the discretion either to extend this MOU on the Developer agreeing to pay interest at the rate of 12% p.a. or to terminate this MOU after giving a notice of thirty days to the Developer to pay the consideration. On the Developer failing to pay the monies demanded as aforesaid, this MOU shall stand terminated only upon the Owner/VIT refunding free of interest within three months thereafter all amounts by then deposited/advanced/paid by the Developer.

12. It is common ground that this is the only clause in the contract between the parties dealing

with the termination of agreement between the parties. It is also admitted position that pursuant to this clause none of the parties have terminated the agreement. Thus, the agreement between the parties is subsisting. Therefore, the claim before the Arbitrator of the Petitioner is for specific performance of the contract. According to the Respondent No.1, the Petitioner was not and is not ready and willing to perform his part of the contract and therefore no interim relief would be made in favour of the Petitioner. However, perusal of the letter dated 14-1-2005, which has admittedly been received by the Respondent's advocate shows that the Petitioner had expressed his readiness and willingness to comply with the terms of the agreement between the parties including the terms regarding the bank guarantee for getting the conveyance executed in his favour. The letter has not been replied by the Respondent. The Petitioner has also expressed , as noted above, his willingness to furnish the bank guarantee and deposit the amount in terms of the contract between the parties. The learned Counsel appearing for the Respondents referred to the internal correspondence between the Petitioners and his bankers to submit that at the

relevant time the Petitioners were not in a position to furnish the bank guarantee. In my opinion, apart from the settled law that in relation to the contract for transfer of immoveable property normally time is not essence of the contract, in so far as the present case is concerned, by their agreement dated 28-6-2004 the parties had chosen to fix a period of four months from 28-6-2004 for executing the transfer deed. Admittedly, by that date the conveyance was not executed. The parties not only did not terminate the contract between the parties for non-execution of the conveyance within the period fixed by the agreement between the parties, but they entered into Addendum, which was entered into after the period fixed for transfer was over. Addendum was entered on 10-12-2004 and what is pertinent is that in the Addendum there is no time limit fixed for execution of the transfer deed. Now, if the agreement itself does not fix any time limit for execution of the transfer deed. No doubt it will have to be executed within a reasonable time. What would be the reasonable time will vary from case to case. In so far as the present case is concerned, so far as the Respondents are concerned, they unilaterally fixed the date for execution of

the transfer deed by letter dated 22nd December, 2004. The date of the execution fixed by that letter is 23/24th December, 2004. Correspondence on record shows that by that time the Respondents themselves had not complied with all the requirements necessary for executing the deed of transfer. It is further to be seen here that it is not the case of the Respondents that because the Petitioners did not furnish the bank guarantee, did not pay the amount and get the deed executed in their favour, the Respondents terminated the contract. Had it been the case of the Respondents that time is the essence of the contract, the Respondents would have terminated the contract on alleged failure of the Petitioners to get the transfer deed executed after furnishing the bank guarantee and paying the amount. Perusal of clause 15 of the agreement shows that before terminating the agreement the Respondent had to give thirty days to the Petitioner and the Petitioner can make payment and comply with the condition which remains uncomplied to avoid termination of the contract. Even if it is assumed that the Respondent had rightly fixed 24-12-2004 as the date for execution of the conveyance and the Petitioner failed to

perform his part of the contract by that date, then also, in terms of the contract the Respondent could not have terminated the contract immediately, but he would be required to give thrity days notice and it was open to the Petitioner to make the payment within the period of thirty days. If the payment is made within thirty days from the notice, the notice of termination looses effect. The Petitioner has offered the money and Bank guarantee within thirty days from 24-12-2004. Therefore, I find that there is considerable force in the contention urged on behalf of the Petitioners that the Respondents are trying to wriggle out of their obligations under the contract, because they want higher price. It is clear from the correspondence that is available on record that the Petitioners have not only paid the amount of Rs.30 crores, but the Petitioners had also secured consent of the bank for giving bank guarantee in the form that is required by the contract between the parties, and therefore, in my opinion, as the agreement between the parties is still intact, if the Petitioners are in a position to furnish a bank guarantee as contemplated by the agreement and also to deposit the amount, it is a case not only for appointing a receiver to protect

the property but also for permitting development on the property in terms of the contract between the parties. It is true that this is an application under Section 9 of the Arbitration Act and if an order is made appointing the Receiver for carrying out development on the property, it may amount to granting a relief which is of the nature of final relief. However, in my opinion, considering that the agreement is not terminated, the Petitioners have parted with huge amount and are ready and willing to part with further amount and furnish bank guarantee as per the agreement and also considering the nature of the Arbitral Tribunal and the time that it is likely to take in making the award, an order of such nature is called for in the facts and circumstances of this case.

13. I propose to make an interim order in this case which will permit not only protection of the suit property but would also permit development of the property pending arbitration proceedings mainly because i) The agreement between the parties is intact in as much as it has admittedly been not terminated by following the procedure provided by Clause 15 of the agreement; ii) the parties have

chosen not to fix any time limit for execution of the conveyance, while entering into the Addendum in December, when admittedly the period fixed in the original agreement had expired; iii) the parties amended the agreement on 10-12-2004, and increased the amount of consideration and the Petitioner by letter dt.19-1-2005 expressed that they are in a position to furnish the bank guarantee as per the agreement and pay the balance amount, therefore, it cannot be said that the Petitioners took unreasonably long time to be ready to get the transfer in their favour executed; iv) the Petitioners are willing to furnish the bank guarantee as contemplated by the agreement in favour of the Prothonotary & Sr.Master also to deposit the balance amount, and v) the agreement is an agreement for transfer of the land and considering the above referred circumstances, therefore, there is a strong possibility that the Arbitral Tribunal shall grant an award for specific performance of the agreement. So far as the contention of the Respondents that this is an agreement for development of land and not for transfer of land is concerned, bare perusal of the terms of the agreement shows that it provides for transfer of land to the Petitioners, therefore

the contention has no force.

14. Taking overall view of the matter, therefore, in my opinion, following order would meet the ends of justice.

O R D E R

(i) Interim order in terms of prayer clause a(ii) and a(iv).

(ii) In case the Petitioners deposit an amount of Rs.13.30 crores in this court and furnish a bank guarantee of a nationalised bank in the terms in which it is contemplated by the contract between the parties dated 28-6-2004 to the satisfaction of the Prothonotary & Sr.Master of this Court, within a period of eight weeks from today, interim order in terms of prayer clause a(i) shall stand granted.

(iii) In that event, the Receiver shall take possession of the property and appoint the Petitioners to be his agent in possession of the property on usual terms and conditions, but without security and royalty. It is clarified that in that

event the Petitioners shall be entitled to develop the property in accordance with law.

(iv) Petitioners shall be at liberty to apply for further reliefs, if necessary, either from the court or from the Arbitral Tribunal.

(v) In case the bank guarantee is furnished and the amount is deposited, the amount shall be invested in a fixed deposit in a nationalised bank during the pendency of the Arbitration proceedings. In relation to the bank guarantee, the Respondents shall be at liberty to make an application for further orders either before the Court or before the Arbitral Tribunal.

(vi) In case the Petitioners fail either to deposit the amount of Rs.13.30 crores as directed above or to furnish the bank guarantee within the period mentioned above, this order shall stand vacated and the petition shall be treated as dismissed. It is clarified that the amount shall be deposited and the bank guarantee shall be furnished by the Petitioners with due notice to the Respondents.

(vii) Petition disposed of.

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